

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE NEBRASKA PUBLIC SERVICE COMMISSION, ON ITS OWN MOTION, SEEKING TO INVESTIGATE QWEST’S SWITCHED ACCESS CHARGE RATES	DOCKET NO. C-3345/NUSF-42/PI-93
QWEST CORPORATION’S RESPONSE TO MOTION FOR INTERIM RELIEF	

Qwest Corporation, (“Qwest”), by and through its counsel, responds to the Motion For Interim Relief Pending Investigation (“Motion”) filed by the Department as follows:

Introduction

1. This Commission’s rate regulation jurisdiction is limited by statute, and the relevant statutes, Neb, Rev, Stat. § 86-140 and § 86-144, do not permit the interim relief the Department seeks. Moreover, no Commission rule or provision of Nebraska’s Administrative Procedures Act allows for interim relief. This absence of authority is compounded by the procedural shortcomings of the Department’s Motion and the procedure implemented allowing only oral argument on the Motion, not a presentation of evidence. The Department’s Motion presents no facts – just unsupported allegations. No person swore to the allegations, and there is no evidentiary or other basis for them, as demonstrated by the affidavit of Scott McIntyre submitted contemporaneously herewith, which contradicts all of the allegations in the Motion. Accordingly, the Commission should follow the procedures laid out by the Legislature in § 86-140 for challenges to switched access charges, and deny the motion for interim relief.

Argument

2. The Commission's rate regulation jurisdiction is limited by statute, and has been since 1987. Pursuant to Neb. Rev. Stat. § 86-123(2), "[t]he commission may regulate telecommunications company rates pursuant to sections 86-139 to 86-157." This is the only rate regulation authority given to the Commission by the Legislature. Section 86-139 confirms the limited scope of Commission jurisdiction to regulate rates:

Except as provided in the Nebraska Telecommunications Regulation Act, **telecommunications companies shall not be subject to rate regulation by the commission** and shall not be subject to provisions as to rates and charges prescribed in sections 75-101 to 75-158.

The Commission agreed that "[t]he Commission's ability to set rates and prices for service provided by regulated entities generally is . . . limited by statute," referring in a footnote to the limiting provisions of § 86-139, as recently as last September, in its ruling closing the docket in *In the Matter of the Petition of Chase 3000, Inc., et al.*, Docket No. C-3233/PI-84, Order Closing Investigation (September 21, 2004). Thus, the only authority the Commission has to implement any regulation of Qwest's rates comes from Neb. Rev. Stat. §§ 86-139 through 86-157.

3. The relevant statutes here are Neb. Rev. Stat. § 86-140 and § 86-144. On December 20, 2004, Qwest filed a tariff increasing its switched access charges, pursuant to § 86-144, which provides that in an exchange in which local competition does not exist, telecommunications companies shall file rate lists which, for all telecommunications services except for basic local exchange rates, shall be effective

after ten days' notice to the Commission.”¹ Accordingly, Qwest's new rates took effect on January 1, 2004.

4. Switched access rates are also governed by § 86-140. That section provides explicit procedures for “affected telecommunications compan[ies]” and the Commission to follow in order to resolve disputes and review or change an access charge that has been “imposed.” Among these important procedures:

- a. Charges “imposed” are to be “negotiated by the telecommunications companies involved.”
- b. An affected telecommunications company or the Commission may initiate an action to review those charges.
- c. The Commission “shall, upon proper notice, hold and complete a hearing on the application or motion to review the charges within sixty days of the filing,” unless otherwise agreed by all the parties.
- d. The Commission may enter an order setting access charges that are fair and reasonable “within sixty days **after** the close of the hearing.” (emphasis added).
- e. The Commission “shall not order access charges which would cause the annual revenue to be realized by the local exchange carrier from all interexchange carriers to be less than the annual costs, as determined by the commission based upon evidence received at hearing, incurred or which will be incurred by the local exchange carrier in providing such access services.”
- f. Reductions made to access charges pursuant to § 86-140(1) “shall be passed on to the customers of interexchange service carriers in Nebraska whose payment of charges have been reduced.”

5. Section 86-140 does not contemplate or even mention interim relief. To the contrary, the language of § 86-140 recognizes the need for a quick resolution of access charge disputes, and sets an accelerated schedule for their disposition – no

¹ Qwest does not concede that local competition does not exist throughout Nebraska. However, Qwest has not yet filed a request to have any exchanges in Nebraska declared competitive, as required by Neb. Rev. Stat. § 86-143(2) before Qwest could take advantage of the procedures for implementing rate changes outlined in § 86-143.

more than 120 days from the time the review begins until a final order is entered by the Commission. There is no provision to suspend filed rates on an interim basis in § 86-140, as there is in § 86-145(2)(b), which addresses challenges to increases in basic local exchange rates initiated by subscriber complaint. The legislature certainly knew how to provide for interim relief in the nature of suspending a tariff, but elected not to provide for such relief in the accelerated proceedings for review of access rates.

6. In addition, In 1998, the registered voters of the State of Nebraska, by initiative submitted to the Secretary of State of Nebraska, proposed to amend § 86-140, by rewriting (2), and adding (3), the stated purpose being to develop competition in the telephone access service marketplace by requiring that: (1) the Nebraska public service commission set access charges imposed by local telephone carriers for access to local telephone networks based upon forward-looking economic costs without implicit subsidies; (2) average, aggregate prices charged to consumers for long distance service within the state reflect the reduction in access charges applicable to that service; and (3) local exchange access be cost-based, competitively neutral, and non-discriminatory. The voters rejected those changes to the section, further confirming the limited nature of the Commission's jurisdiction to regulate access rates beyond the terms provided by the legislature. Put simply, the Commission should not act where the legislature and the people have failed or refused to provide for the interim relief sought by the Department.

7. There is no prejudice here. These access charges were noticed on December 20, 2004, almost six months ago, and Qwest witnesses indicated in hearings in Docket NUSF-26 during 2002 that if NUSF high cost fund distributions were to

decrease, Qwest would have to look towards increased rates of some of its services to make up the difference. The Department and Commission Staff also asked Qwest before the proceedings even began, and asked all parties at the April 14 prehearing conference, to agree to extend the statutory time period. All parties, including Qwest, agreed, based on the facts known to them at that time. In reliance on the parties' agreement, the Commission set an expedited discovery and testimony schedule, and the hearing of this matter was set for July 13, 2005. Twelve days after the prehearing conference, however, the Department filed its Motion, ostensibly claiming that the Commission should not wait until the facts were gathered to regulate and set Qwest's access rates. This is unfair, and would cause Qwest's willingness to accommodate Staff's request to extend the proceedings to work against it.²

8. There is particularly no reason to depart from the statutory scheme in light of the complete absence of facts presented to support the Department's Motion. The allegations of the Motion are broad, unsubstantiated and unsworn allegations. Section 86-140 only allows the Commission to change rates **after** a hearing, and its ruling must be based on evidence received at the hearing. There has been no hearing, and the Department has only requested oral argument on its Motion. Even if § 86-140 could be read to implicitly permit interim relief, that relief at a minimum would have to be based on some facts, and the Department as movant would bear the burden to present those facts to the Commission and the parties. The Department has presented none. In contrast, Qwest presents evidence by way of the affidavit of Scott McIntyre that establishes the following facts:

² Qwest accordingly will withdraw its agreement to extend the deadline for a hearing of this matter beyond the statutory deadline if the Department's Motion is granted.

- a. Effective January 1, 2005, Qwest increased its Nebraska intrastate average switched access rates from approximately one cent per terminating minute of use ("mou") to approximately four cents per terminating mou.³ The same rates apply to originating mou.
- b. Qwest initiated this change as a result of decreases in support Qwest has and will receive from the NUSF. In 2004, after accounting for porting of support to competitive carriers, Qwest received approximately \$30,500,000 in high cost support from the NUSF. Based on distributions so far in 2005, that support will decrease to approximately \$20,000,000 in 2005. Forecasts from the distribution model used by the Commission in NUSF-26 indicate that this support will further decrease to approximately \$14,400,000 by 2010.
- c. Based on Qwest's internal forecasts of switched access demand and usage, the increase in access revenue that will result from the new rates is less than \$11,000,000 per year. This increase in revenue closely approximates the lost revenue from NUSF support in 2005 compared to 2004, and is much less than the loss in NUSF support in 2006 and subsequent years, compared to 2004 support.
- d. Thus, contrary to the assertion in the Department's Motion for Interim Relief, and even assuming such assertions are relevant to this proceeding, (1) Qwest, and as a result Qwest's customers, will be significantly harmed if Qwest's access tariff is "suspended" as the Department requests; and (2) Qwest's increase in intrastate switched access revenue resulting from the new rates corresponds to or is less than the reduction in support Qwest faces at this time. Indeed, under a common-sense view of harm, the possibility that Qwest may have to forego approximately \$900,000 in monthly access revenue during the pendency of this investigation standing alone qualifies as harm to Qwest.
- e. If Qwest loses revenue, Qwest's ability to maintain or improve its network is compromised. Thus, suspending Qwest's tariff can cause significant harm to consumers in the state of Nebraska through increased local telephone rates or other charges, and through slowing down Qwest's ability to invest in such network improvements as providing broadband to high-cost areas.
- f. Qwest's access charge is not discriminatory. The charge applies to all similarly situated users of Qwest's access services equally, on equally available terms and conditions, pursuant to Qwest's publicly filed tariff.

³ These figures approximate average revenue anticipated per mou. Differing demand and usage patterns could slightly change the average revenue per mou, but regardless of these factors, and expressed to the nearest penny, Qwest's access rates are increasing from an average of approximately 1 cent per mou to approximately 4 cents per mou.

- g. Qwest's access charge is not anticompetitive. Qwest's survey of access charges in Nebraska reveals that Qwest's new access rate lies approximately in the middle of other access rates being charged by CLECs, and is lower than most other ILECs.

In light of these facts, which are presently uncontested except by unsworn allegations, granting the motion would be arbitrary and capricious, as discussed in *Nebraska Public Service Commission v. A-1 Ambassador Limousine, Inc.*, 646 N.W.2d 650, 660 (Nebraska 2002) :

A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis that would lead a reasonable person to the same conclusion. *In re Application of Neb. Pub. Serv. Comm., supra*. An action taken by an administrative agency in disregard of the facts or circumstances of the case and without some basis which would lead a reasonable and honest person to the same conclusion is arbitrary and capricious as a matter of law. *Id.* A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change.

9. Alltel and MCI claim, also without evidentiary or affidavit support, in their Responses to the Motion that (a) Qwest did not negotiate the rates before its December 20, 2004 filing, such that (b) Qwest's rate change is void *ab initio*. This argument is entirely illogical, and misreads § 86-140. First, the duty to negotiate arises after access rates are "imposed." The use of the word "imposed" in the past tense is important. The statute does not say "to be imposed" or "proposed to be imposed," but Alltel and MCI attempt to distort the meaning of the plain language to create such a result.

10. Second, the duty to negotiate is discussed in the context of a subsection discussing review of access charges and commission proceedings thereon, not in the context of filing for new charges, which is covered in § 86-144. No part of § 86-144 requires negotiations prior to filing notice of changed access rates. No language in § 86-140 provides that negotiations are a condition of filing rates pursuant to § 86-144, or provides a remedy if negotiations do not take place. Read in the context of the rest of

the statute, the negotiation requirement is properly interpreted as an obligation of carriers before bringing an action for review of access charges,⁴ not a condition of filing the charges in the first place. Accepting MCI's and Alltel's argument on this point would impose an unduly harsh penalty for failing to observe what at most is salutary language.

11. Finally, the logical end of MCI's and Alltel's argument demonstrates its absurdity. If the effectiveness of access rate changes are dependent on negotiations prior to filing,⁵ then no access rate ever filed without negotiation would be valid. Qwest is prepared to present evidence that it did not negotiate with affected telecommunications carriers before implementing any of the access rate reductions it has made since 1998. Applied to these facts, the result of MCI's and Alltel's *void ab initio* argument would mean that in addition to Qwest's most recent access filing being voided and refunds ordered, the Commission would also have to void decreased access charges and refund under-collections to Qwest if no pre-filing negotiations took place. Such a result would be bad public policy, particularly in light of the ambiguous nature of the negotiations language in § 86-140,⁶ and the Commission should reject MCI's and Alltel's invitation to torture the statute in this way.

⁴ Such a requirement would not apply in this case, where the Commission initiated the action.

⁵ Assuming *arguendo* that § 86-140 requires pre-filing negotiations, even access rate decreases would require such negotiations. Local carriers reducing their access charges would have at least some interest in confirming that the interexchange carriers paying reduced access charges would pass on the reductions to the local carriers' customers who used long distance services, as required by § 86-140(2).

⁶ Section 86-140 does not describe how any negotiations should take place, how "affected carriers" would be determined or how local carriers would be able to determine all the carriers that might pay access charges, or what should happen in such negotiations. As such, the language is properly read as guidance for carriers who wish to seek review of a local carrier's access charges, in order to avoid the expense and effort of a formal access charge review.

Conclusion

12. There is simply no reason to rush to judgment on Qwest's access rates. The applicable statutes provide for a quick resolution to challenges to access rates, and do not provide for interim relief. Apart from Mr. McIntyre's affidavit, there are no facts before the commission at all – much less any facts that would justify a departure from the limited exception to the law of rate deregulation contained in § 86-140. The Commission should deny the Department's Motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
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